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IN THE
COURT OF APPEALS OF INDIANA

DUANE E. BABER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0606-CR-328
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 2
The Honorable Daniel Pfleging, Judge
Cause No. 29D02-0407-FC-82

May 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Upon remand by our Supreme Court in Baber v. State, 842 N.E.2d 343 (Ind. 2006), cert. denied, 127 S.Ct. 128, the trial court resentenced Baber to the same aggregate term of eight years executed. In this appeal, Baber challenges his sentence, presenting two issues for our review: (1) whether the trial court failed to consider significant mitigators as part of its decision-making process with regard to the sentence to be imposed, and (2) whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm but remand with instructions.

Following a jury trial, Baber was found guilty of attempted battery as a Class C felony, attempted domestic battery as a Class A misdemeanor, pointing a firearm as a Class D felony, and criminal recklessness as a Class D felony. The facts most favorable to the convictions were set out by this court in Baber v. State, 834 N.E.2d 146, 147-48 (Ind. Ct. App. 2005), trans. granted:

> "On the afternoon of July 1, 2004, Duane and his wife of nineteen years, Deanne Baber, went to Harbor Storage Facility in Noblesville. Duane had been drinking whiskey throughout the day and was angry with Deanne. While Deanne was driving to the storage facility, Duane's anger with her escalated, and he punched the dashboard and broke the windshield with his fist. Deanne dropped off Duane at their storage unit and drove away to let Duane cool off. About fifteen minutes later, Deanne headed back to check on Duane and parked her vehicle near their storage unit. As Deanne started to exit her vehicle, Duane reached into his vehicle, pulled out a shotgun, pointed it in Deanne's direction, and fired. Deanne was not hit. She then returned to her vehicle and sped off. Deanne called the police, and Duane was later arrested at their storage unit."

On December 9, 2004, the trial court sentenced Baber to the maximum term for each conviction[1] and ordered the sentences to be served concurrently for a total aggregate sentence of eight years. Thereafter, Baber filed his notice of appeal raising challenges to both his convictions and sentence. On September 14, 2005, this court issued its opinion affirming Baber's convictions but refusing to entertain Baber's challenge to his sentence upon grounds that it violated Blakely v. Washington, 542 U.S. 296 (2004). Baber, 834 N.E.2d at 152. With regard to Baber's Blakely challenge, this court concluded that Baber forfeited such claim by failing to make a Blakely objection during his sentencing hearing. Id. Thus, this court affirmed Baber's sentence.

Our Supreme Court granted transfer, and on February 14, 2006, issued an opinion in which it reversed those parts of Baber's sentence enhanced beyond the standard terms as being in violation of Blakely.[2] Baber, 842 N.E.2d at 345. The Court remanded the case for a new sentencing hearing during which the State could elect to prove adequate aggravating circumstances before a jury, accept the standard sentence, or elect to forgo

[1] Specifically, the trial court sentenced Baber to eight years for the Class C felony attempted battery conviction, see Ind. Code § 35-50-2-6 (Burns Code Ed. Repl. 2004); one year for the Class A misdemeanor attempted domestic battery conviction, see Ind. Code § 35-50-3-2 (Burns Code Ed. Repl. 2004); and three years for both the Class D felony pointing a firearm and criminal recklessness convictions, see Ind. Code § 35-50-2-7 (Burns Code Ed. Repl. 2004).

[2] In deciding to impose the maximum sentence upon each count, the trial court apparently considered three aggravating factors: Baber's criminal history, Baber's previous failed attempts with probation, and the fact that Baber did not show remorse to the court. As our Supreme Court concluded, the latter two aggravating considerations were improper, as they were not found by a jury beyond a reasonable doubt.

the empaneling of a jury and stipulate to Baber's being resentenced by the trial court only in light of the aggravating factors for which a jury determination is unnecessary.[3] Id.

The State decided to forgo the empaneling of a jury, and on June 6, 2006, the trial court resentenced Baber to the same sentence which was originally imposed by the court—a total aggregate sentence of eight years.[4] In deciding what sentence to impose, the resentencing court considered Baber's criminal history, i.e. the only aggravating factor for which a jury determination was unnecessary, and one mitigating circumstance—undue hardship to Baber and his children. The court concluded that the aggravating factor outweighed the mitigating circumstance. Baber filed his Notice of Appeal on June 8, 2006.

It is well established that sentencing decisions are within the sound discretion of the trial court. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court uses aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. Id. The trial court is not required to find the presence of mitigating circumstances. Id. When a

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[3] The Supreme Court summarily affirmed the Court of Appeals opinion in all other respects. Baber, 842 N.E.2d at 345.

[4] Specifically, the resentencing court sentenced Baber to the maximum of eight years for the Class C felony attempted battery conviction, one year for the Class A misdemeanor attempted domestic battery conviction, and three years for each of the Class D felony pointing a firearm and criminal recklessness convictions. The resentencing court ordered that the sentences run concurrently. The court also found that the attempted domestic battery conviction "merged" with the attempted battery conviction and that the criminal recklessness conviction "merged" with the attempted battery and attempted domestic battery convictions.

defendant offers evidence of mitigators, the trial court has discretion to determine whether such proffered mitigators are entitled to mitigating weight and need not give the same weight or credit to the mitigating evidence as the defendant does. Id. The trial court is not required to explain why it does not find the proffered circumstances to be mitigating. Id. Upon appeal, we accord great deference to the trial court's assessment of the proper weight to be afforded to mitigating and aggravating circumstances and will set aside the trial court's judgment only upon a showing of a manifest abuse of discretion. Id.

Here, the trial court, although affording such minimal weight, identified as a mitigating circumstance the hardship to Baber and his adult children. Baber nevertheless argues that the trial court improperly overlooked two significant mitigating factors, namely his remorse and the fact that he is unlikely to commit another crime based upon the circumstances, his character, and his attitude.

Baber asserts that during the sentencing hearing he expressed great remorse for his actions:

> "I take full responsibility for what I did. I'm very sorry. I'm more sorry for what it has done to my family. But, I'm really sorry because it, it has kind of drove a wedge between me, my wife and my children, and especially between my children and my wife because they try to blame her and it's not her fault – it's mine. I put myself in a bad position and made a really stupid mistake and bad judgment. I mean, I can't change it. I wish I could." Transcript at 22.

An expression of remorse does not necessarily equate to a significant mitigating factor. See, e.g., Ousley v. State, 807 N.E.2d 758, 764 (Ind. Ct. App. 2004); Gray v. State, 790 N.E.2d 174, 177 (Ind. Ct. App. 2003). Taking Baber's statement at face value, it appears

that Baber is remorseful for what he has done. Be that as it may, our review of whether Baber was truly remorseful is hampered by the fact that we review a paper record and thus, we are unable to witness the emotions and feelings exhibited by Baber as he made his statement to the court. This is precisely why we defer to the trial court's assessment as to a defendant's expression of remorse. We would further note that in imposing the original sentence, the trial court considered as aggravating, although subsequently deemed improper, that Baber had not expressed remorse. Baber's expression of remorse this second time may simply have been an attempt to sway the trial court to impose a lesser sentence, rather than a true expression of remorse. Based upon the record before us, we cannot say that the trial court abused its discretion in refusing to find Baber's expression of remorse to be a significant mitigating factor.

Baber also argues that the record clearly supports as a mitigating circumstance the fact that he is unlikely to commit another crime based upon the circumstances underlying the instant offenses, his character, and his attitude. Baber asserts that due to his participation in an anger management program during his current incarceration, he has learned to manage and control his anger, as well as change his way of thinking altogether. His changed demeanor has been observed by others who feel that Baber is now "a lot calmer than what he use to be. [That he] talks more sensibly." Transcript at 33. Baber also asserts that he has removed himself from the lifestyle and surroundings which contributed to his poor behavior by cutting off contact with Deanne, the victim of the instant crimes as well as of his prior offenses of assault and battery.

The record reflects, however, that Baber had once before participated in an anger management program in 1997 after he was placed in a diversion program for a battery allegation. Despite his involvement in the program, Baber was later convicted of two counts of assault, battery, and resisting law enforcement. As for cutting off contact with Deanne, Baber attempted to initiate divorce proceedings but was unsuccessful. Thus, despite his claim that he has removed himself from a hostile relationship which has given rise to the instant offenses and several prior convictions, there is an indication that Baber will interact with Deanne in the future.[5] After reviewing the record, we cannot say that the trial court abused its discretion in refusing to afford significant mitigating weight to Baber's claim that he is unlikely to commit another crime based upon the circumstances underlying the instant offenses, his character, and his attitude.

Finally, Baber argues that his sentence is inappropriate and requests this court to exercise our authority under Appellate Rule 7(B), pursuant to which we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Baber asserts that the presumptive sentence of four years would be an appropriate sentence.

We first consider the nature of the offense. We begin by noting the apparent hostile nature of Baber's relationship with his wife, Deanne. On the day of the instant offenses, Baber drank himself into a state of intoxication. His anger with Deanne

[5] Baber's son and twenty-year-old daughter live in Tennessee but apparently do not have contact with Deanne who also resides in Tennessee.

escalated to the point where he punched the dashboard of the car and broke the windshield with his fist. After Deanne removed herself from the situation for a short period of time hoping that Baber would "'cool off,'" she returned to where she had left him only to be confronted by Baber pointing a shotgun in her direction and firing at her. These facts demonstrate Baber's complete disregard for the law and for human life, more specifically, the life of his wife and mother of his children.

With regard to Baber's character, we note that Baber is an admitted alcoholic and that he obviously has anger control problems. His criminal history is quite probative. In 1997, Baber was placed in a diversion program for a misdemeanor battery offense. Since that time, Baber has accumulated six convictions: assault, two domestic assaults, operating a vehicle with a BAC above .15, battery, and resisting law enforcement. We further note that several of his prior convictions identify Deanne as the victim. (Appellee's App-3-4) Despite his prior involvement with the criminal justice system and participation in a diversion program, Baber is consistently unable to control his anger and expresses his rage by resorting to physical violence. Having considered Baber's character, as demonstrated by his criminal history, which includes related crimes, his apparent inability to control his anger, especially around his wife, and his admitted abuse of alcohol, we conclude that an enhanced sentence was warranted. Given the nature of the offense and the character of this offender, we cannot say that the sentence imposed is inappropriate.

Although not presented by Baber upon appeal, we *sua sponte* address the propriety of the court's "merger" of two of the convictions and sentences imposed thereon. As

noted in footnote 4, supra, the resentencing court entered judgments of conviction upon each offense and then proceeded to impose the maximum sentence for each offense. The trial court then found that the sentences were to run concurrently and that the attempted domestic battery and criminal recklessness convictions and sentences thereon "merged" with the conviction and sentence for attempted battery. As we have before stated, a double jeopardy violation occurs when judgments of conviction are entered, and such violation cannot be remedied by the "'practical effect'" of concurrent sentences or by merger after conviction has been entered. See Jones v. State, 807 N.E.2d 58, 67-68 (Ind. Ct. App. 2004), trans. denied. Here, where the trial court clearly entered judgments of conviction for each offense and imposed separate sentences upon each, "merger" of the convictions and sentences is inadequate. We therefore order the trial court to vacate the convictions and sentence for attempted domestic battery and criminal recklessness.[6]

The judgment of the trial court is affirmed, but we remand with instructions for the trial court to vacate the convictions and sentences for attempted domestic battery and criminal recklessness.

SHARPNACK, J., and CRONE, J., concur.

[6] Our decision is not in conflict with our Supreme Court's decision in Green v. State, 856 N.E.2d 703 (Ind. 2006). In that case, our Supreme Court held that there is no need to remand to the trial court to vacate a lesser-included offense where the record was unclear as to whether a formal judgment of conviction had been entered and where the defendant did not receive a sentence upon the lesser-included offense. Here, the trial court's sentencing statement and abstract of judgment clearly demonstrate that the trial court entered judgments of conviction upon each offense and imposed a separate sentence upon each offense before "merging" the offenses which the trial court apparently found to violate double jeopardy principles.